

# Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach

Hein, Michael

Veröffentlichungsversion / Published Version  
Zeitschriftenartikel / journal article

## Empfohlene Zitierung / Suggested Citation:

Hein, M. (2011). Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach. *Studies of Transition States and Societies*, 3(1), 3-23. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-363991>

## Nutzungsbedingungen:

Dieser Text wird unter einer Deposit-Lizenz (Keine Weiterverbreitung - keine Bearbeitung) zur Verfügung gestellt. Gewährt wird ein nicht exklusives, nicht übertragbares, persönliches und beschränktes Recht auf Nutzung dieses Dokuments. Dieses Dokument ist ausschließlich für den persönlichen, nicht-kommerziellen Gebrauch bestimmt. Auf sämtlichen Kopien dieses Dokuments müssen alle Urheberrechtshinweise und sonstigen Hinweise auf gesetzlichen Schutz beibehalten werden. Sie dürfen dieses Dokument nicht in irgendeiner Weise abändern, noch dürfen Sie dieses Dokument für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, aufführen, vertreiben oder anderweitig nutzen.

Mit der Verwendung dieses Dokuments erkennen Sie die Nutzungsbedingungen an.

## Terms of use:

This document is made available under Deposit Licence (No Redistribution - no modifications). We grant a non-exclusive, non-transferable, individual and limited right to using this document. This document is solely intended for your personal, non-commercial use. All of the copies of this documents must retain all copyright information and other information regarding legal protection. You are not allowed to alter this document in any way, to copy it for public or commercial purposes, to exhibit the document in public, to perform, distribute or otherwise use the document in public.

By using this particular document, you accept the above-stated conditions of use.

# Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach

Michael Hein\*

## Abstract

Post-autocratic transitions are often followed by constitutional conflicts between state powers. With respect to the question of rule of law in young democracies, clashes between the executive and legislative branches, on the one hand, and the judiciary and constitutional courts, on the other, as well as those between ordinary and constitutional courts are particularly virulent. All these conflicts have massively affected the key distinction between politics and law that had been mainly violated in the previous autocratic regimes. Based on Niklas Luhmann's theory, this article presents a systems-theoretical approach in order to explain the occurrence of these constitutional conflicts. The central argument reads as follows: constitutional conflicts between politics and law will occur under two circumstances— if a constitutional order allows the decision of legal questions based on political criteria or vice versa, and if a constitutional order allows the judiciary or the constitutional court to decide political questions based on political criteria. This argument is further substantiated by means of two exploratory case studies with a special emphasis on post-socialist transitions in Central and Eastern Europe. The main results are eight detailed hypotheses on the question of when, in constitutional orders, and under what circumstances are constitutional conflicts to be expected.

**Keywords:** constitutional conflicts, democratisation, transition, systems theory, Central and Eastern Europe.

## Introduction

Post-autocratic transitions are often followed by constitutional conflicts between state powers. In a general sense, these conflicts can be defined as quarrels in which either two or more actors draw upon the same constitutional competence or one actor claims a competence that draws the disapproval of another. So far, political scientists have mainly focused on such conflicts between twin-headed executives or between governments and parliaments, insofar as such clashes have affected the core of the democratic institutional order. In contrast, the relationships between the executive and legislative branches, on the one hand, and the judiciary and constitutional courts, on the other, as well as those between ordinary and constitutional courts have only rarely figured on the research agenda. This especially holds true for comparative studies on politics and democratisation, where 'blanket references to a lack or limitation of rule of law' (Lauth & Sehring 2009: 166) often are the maximum level of attention. However, it is beyond dispute that 'democracies cannot consolidate unless they create judicial institutions, mechanisms and remedies for a complete rule of law constructed by democratic means' (Calleros 2009: 180). Therefore, it seems appropriate to expand the research perspective to constitutional conflicts that incorporate judicial institutions.<sup>1</sup>

\* E-mail: michael.hein@uni-greifswald.de

1 While Jasper de Raadt (2009b: 319) mentions the possibility of considering conflicts 'with regard to the role and competencies of constitutional courts', he does not provide further discussion on this issue.

A large variety of such conflicts can be observed in the post-autocratic transitions of nations, especially those situated in the Central and Eastern European post-socialist region. For instance, from 2002 to 2009, Bulgaria underwent a vigorous constitutional conflict concerning the opportunities for judicial reform. The judiciary and the constitutional court of Bulgaria gradually expanded their powers while reducing the political scope of the parliament and government by making constitutional amendments increasingly difficult (see Hein 2006, 2007). A similar development occurred in Croatia in 2000/2001 with, however, much less success for the opponents of structural judicial reform (see Uzelac 2002). In 2006, the Czech Republic underwent a conflict regarding the question of whether the parliament should be allowed to stipulate continuing professional education for judges. The country's constitutional court annulled this provision of the law on judges as unconstitutional, based on the conviction that it would interfere with the judiciary's independence. The 'fortress of judicial independence' (Bobek 2008: 99) that protected the judiciary from any attempt of structural reform was thereby retained. A different conflict is currently in the spotlight in Romania, where the government, parliament, judiciary and the constitutional court have been struggling for a couple of years to obtain the power to file complaints against members of government involved in criminal cases. By introducing extensive immunity rights for the said members of government, the Romanian constitution has established an era of virtual lawlessness. Until now, not a single former or current (prime) minister has been sentenced for any sort of crime, including and above all for corruption (see Hein 2009). A glance at the situation outside the post-socialist world reveals that in countries such as Spain, for example, there has been much politicisation of both the judicial self-administration and the appointment of the constitutional court members for the last several decades. This has resulted in a virulent and protracted conflict between the Supreme Court and the constitutional court that is literally known as a 'Guerra de Cortes' (see Hansen 2008).

All these conflicts have massively affected the key distinction between politics and law. In fact, it was this distinction that had been mainly violated in the previous autocratic regimes. So far, the problems of post-autocratic transitions and the relationship between politics and law have generally been explained at the informal level, that is, in terms of problematic political and legal cultures or the existence of clientelistic networks (see Gönenç 2002: 78-102, Grey 1997). This approach largely ignored the role played by formal institutions. In contrast, studies on formal institutional structures often misunderstand the effects of these structures on both political influences on the judicial sphere and vice versa. In most cases, these studies are primarily interested in the judiciary's independence from political influences exerted by the executive or legislative branches (see Calleros 2009, Melone 1996); they rarely recognise the possibility that the existence of an extensive degree of autonomy at the formal level, in combination with the absence of functioning checks and balances, will result in the phenomenon of the politicisation of judicial state organs through clientelistic networks (see Bobek 2008, Schönfelder 2005). To sum up, the literature so far lacks an overall explanation of the occurrence of constitutional conflicts between political and legal institutions in transition societies.

Therefore, this article explores the following research question: which institutional rules enable or provoke constitutional conflicts between politics and law? In order to answer this question, this study will first present a systems-theoretical approach based on the theory of Niklas Luhmann. Through this, it will be demonstrated that the relationship between politics and law, when considered from a systems-theoretical perspective, can provide researchers the opportunity to develop hypotheses for empirical studies, despite the common prejudices regarding the putative inability and unsuitability of Luhmann's theory for empirical research (cf. Habermas 1990: 353-355, Esser 2007). The central argument deduced from this theory reads as follows: constitutional conflicts between politics and law will occur under two circumstances—if a constitutional order allows the decision of legal questions based on political criteria or vice versa, and if a constitutional order allows the judiciary or the constitutional court to decide political questions based on political criteria. Second, due to their general and abstract character, these hypotheses will be further substantiated by means of two exploratory case studies. The article is thus

structured as a comparative, disciplined-configurative study (see Verba 1967: 114-115, cf. Gerring 2004: 348-349). Its goal is 'theory elaboration' in the sense of 'refining a theory, model or concept in order to specify more carefully the circumstances in which it does or does not offer potential for explanation' (Vaughan 1992: 175). As the main result, the two general hypotheses will be expanded into eight detailed hypotheses on the question of when, in constitutional orders, and under what circumstances are constitutional conflicts to be expected. These hypotheses are open to further empirical testing.

The following sections will first present the systems-theoretical understanding of politics, law and constitutional conflicts in modern societies. Thereafter, the general hypotheses for this study will be deduced with respect to the special situation of transition societies. Then, the contents of the two case studies on constitutional conflicts that have occurred in Bulgaria and Romania after 1991 will be briefly outlined, that is, the characteristics of these conflicts will be discussed. On this twofold basis, the eight concrete hypotheses mentioned above will be derived. These hypotheses will pertain to the administration of the judiciary, that is, ordinary courts and the procuracy,<sup>2</sup> the unlegislated areas of personal immunity in the legislative and executive branches, and the constitutional courts. Finally, the article concludes that constitutional conflicts need not inevitably impede but may actually advance the consolidation of democracy and the rule of law.

## Politics, law and constitutional conflicts in the systems-theoretical perspective

Social sciences mostly take a sceptical view of using Luhmann's systems theory to inform and guide empirical studies. In recent years, however, a number of sociologists, political scientists and legal scholars have emphasised that the systems theory provides 'highly productive tools to draw an adequate picture of modern society' and 'to evaluate its present state and its future' (John *et al.* 2010: 8, cf. King 2006: 38). In the field of political science, systems theory is especially useful with regard to research questions that deal with the political system's relationship with other spheres of society. This is because systems theory does not observe these other areas through 'political glasses' but perceives them as operating according to their own rules and logic. For the purpose of this article, there are three concrete advantages of this approach: First, it provides a viable understanding of politics, law, their mutual relationship and the role of the constitution. Second, systems theory enables political scientists to view the specific situation of post-autocratic transitions as an attempt to discontinue the law's subordination to politics—in other words, to usher in democracy and the rule of law. Third, this theory allows us to observe the role of formal institutions in constitutional conflicts. In particular, it exposes the political aspects of intrinsically judicial institutions like the procuracy or ordinary courts.

### Politics, law and the constitution in functionally differentiated modern societies

From the systems-theoretical perspective, the term *functionally differentiated modern society* describes the type of society that has emerged since the early modern period in large parts of Europe, North America and some other parts of the world. With regard to politics and law, this society is characterised by democracy and the rule of law. There are several types of operationally closed functional systems, each of them performing a specific function in society. The function of the political system is to provide the capacity to take collectively binding decisions. The function of the legal system is to establish and stabilise normative expectations (Luhmann 2000: 86, 2004: 148). Based on this differentiation of social communication, modern societies have achieved a much higher level of complexity than pre-modern

<sup>2</sup> Despite its connotation of Soviet-style constitutional orders, I have followed the terminological suggestion of Anne van Aaken, Eli Salzberger and Stefan Voigt (2004) and used the general term 'procuracy' instead of its manifold synonyms such as 'prosecution office', 'prosecution service', 'attorney' and so on. See also Aaken *et al.* (2010).

societies, which were vertically differentiated into a stratified pattern. In functionally differentiated societies, constitutions serve as the structural coupling for politics and law (see Luhmann 1990, 1991). In particular, constitutions solve certain virulent problems associated with two aspects of these functional systems: (1) their autonomy and (2) their self-reference.

(1) One of the central assumptions of Luhmann's theory is that systems are autonomous, that is, they are not able to determine each other. Autonomous functional systems develop their specific identity by producing a binary communication code, through which they are able to distinguish themselves from their environment. The code of the legal system is legal/illegal. The basic code of the political system is power/no power. With the development of modern democracies, this code has been re-coded to fit the scheme of government/opposition (Luhmann 2004: 94; 2000: 97-102). This code defines all the important positions of power at the centre of the political system. Due to the coding, functional systems may connect only to their own acts of communication. They are only responsive to irritations from outside if they can 'translate' these irritations into their own communicative pattern, that is, if they are able to subsume them under their own binary code. Social systems are, therefore, operationally closed but cognitively open—they are autopoietic but not autarkic. In fact, they are permanently influenced by the outside and are dependent upon several services performed by their environment. Furthermore, functional systems not only are occasionally inter-related with each other but also develop permanent mutual expectations. These 'coupling mechanisms are called structural couplings if a system presupposes certain features of its environment on an ongoing basis and relies on them structurally' (Luhmann 2004: 382). The constitution is such a structural coupling. It defines the way in which the political system is able to influence the legal one, for example, through law-making, constitutional amendments, and establishing and modifying judicial institutions or appointments to offices. Moreover, the political system has the opportunity to use the law in order to achieve its political goals. In turn, it is concurrently obliged to observe particular legal norms. Additionally, it enjoys monopoly over the legitimate use of force for the implementation of judicial decisions. In short, 'A constitution enables both the legal system to observe politics judicially and the political system to observe the law politically' (Brodocz 2003: 86). However, this relation 'is not that of Siamese twins who can only move together but rather that of billiard balls which often systematically jolt each other but because of this roll their separated ways' (Luhmann 1990: 204).

(2) Apart from the autonomy problem, the binary coding of functional communication also provokes the problem of self-reference, that is, the code's application to itself. In general, a code does not prohibit the access of any act of communication until it has clarified what kind of communication is to be located on which side of the binary code—for example, what is legal and what is illegal. By itself, a code is merely an empty form, which necessarily has to be filled with specific programs. Above all, political programs—apart from ideologies and party platforms—are the government's concrete commands to public administration. Laws, decrees, standing orders, contracts and the very constitution itself are the programs of the legal system (Luhmann 2000: 260-261, 2004: 192-196). However, even with its programming, a binary code is applicable to all social communication. Hence, to become a part of a functional system, an act of communication also has to be code-orientated. Without this, the law would be identical to the entire society as even the programmed code of legal/illegal is applicable to any communication: that what is not illegal is legal—and vice versa. Therefore, only 'if the question arises whether something is legal or illegal, the communication belongs to the legal system, and if not then not' (Luhmann 1991: 1428). The same holds true for the political system, which—without programming and code-orientation—would not be prohibited from politicising any problem in society (see Luhmann 2000: 96-102). In sum, it is only by using programs and code-orientated communication that functional systems are able to develop their specific identities. However, even this does not solve the problem of the code's application to itself. Therefore, the political and legal systems require the constitution.

For politics, the constitution is a 'selective self-determination of the identity' (Luhmann 1973: 172). The political system is externally limited by the introduction of basic rights. Due to the presence of these rights, large spheres of society become inaccessible or at least hardly accessible for political action. In its internal functioning, politics has to use law instead of violence in order to reach its goals (Luhmann 1990: 203, 2000: 213). Furthermore, the political system's internal structure is designed by the constitution. At any given time, it is clear as to who is in power (the government) and who is not (the opposition). Although the opposition can mobilise its own power resources, it will definitely never be able to exercise governmental power until and unless it crosses the line and itself becomes the government. In the end, the code of government/opposition cannot be applied to itself. Instead, politics is obliged to permanently examine the legality of its activities, especially the rules that define how to become the government. This result, or the 'relevance of the difference between legal and illegal for the political system', constitutes the systems-theoretical understanding of the term *democratic rule of law* (Neves 2000: 76, cf. Luhmann 2004: 368).

With regard to law, the constitution outsources the task of law making, to a large extent, to the political system. Furthermore, it resolves the problem of the variability of positive law: if a law can be amended at any time, who or what prevents the possibility that a certain legal norm will itself be illegal? Therefore, the constitution institutionalises several different, hierarchically related legal spheres with different amendment probabilities: constitutional law/ordinary laws/governmental decrees, national/municipal law, and sometimes federal/state law. With these, law is exposed to its own code. Legal norms may now be described as illegal, that is, unconstitutional, unlawful and so on. With regard to the highest-ranking constitutional law, however, the code of the legal system may no longer be applied to itself—constitutional law cannot be classified as legal or illegal.<sup>3</sup> Via structural coupling, at this stage, we encounter the necessity of political decision-making.

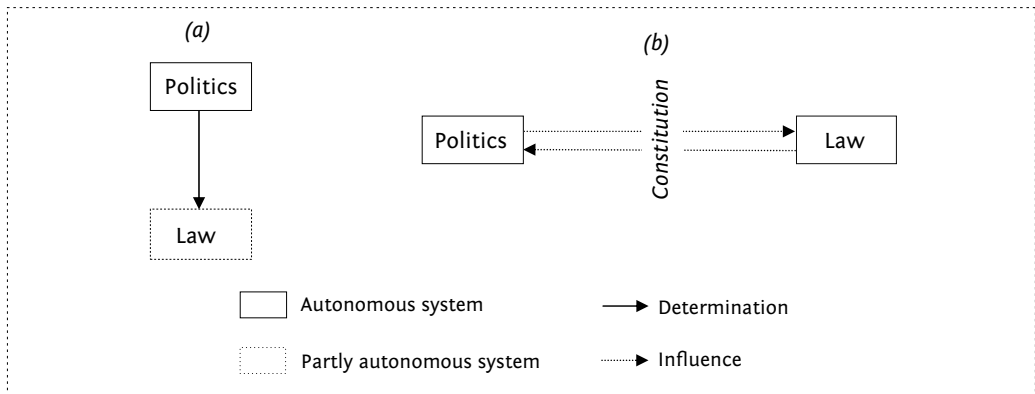
In a nutshell, politics and law in functionally differentiated modern societies have developed stable mutual expectations by institutionalising constitutions as their structural coupling. 'Selections made in the legal sphere become relevant motivations for political communication and vice versa' (Neves 2000: 77). However, neither of these systems is in a position to causally determine the other one, precisely because each side independently decides whether to apply its code to a certain act of communication. With regard to the operational capability of such an arrangement, it is quite clear that the concrete rules provided by a certain constitution are decisive. In other words, there can be different qualities of structural couplings between politics and law. This is especially true for newly established constitutions in transition societies, where politics and law tend to have a somewhat problematic relationship.

### Politics, law and constitutional conflicts in autocratic modern societies and post-autocratic transitions

In order to study the specific situation of post-autocratic transitions, we have to look at their starting point: *the autocratic modern society*. In these societies, regardless of whether the political regimes were rightist as in Latin America and Southern Europe or socialist as in Central and Eastern Europe, the differentiation between law and politics has been more or less abrogated in favour of the latter.<sup>4</sup> For an adequate understanding of such a society, it is appropriate to use the systems-theoretical concept of *peripheral modernity* as developed by Marcelo Neves (2000: 178-183, 2001: 254-263). The description of the relationship between politics and law in the previous section reflects upon a constellation that has only developed in large parts of Europe, North America and some other regions of the world so

<sup>3</sup> An exception in this case would be the concept of unconstitutional constitutional law. This term describes the problem that coequal law should not be contradictory. This, however, is a different phenomenon from the self-reference paradox of illegal law in the systems-theoretical sense.

<sup>4</sup> For socialist states, see Pollack (1990: 293-297); for rightist autocracies, see Ginsburg & Moustafa (2008).



**Figure 1:** Politics and law in (a) autocratic modern societies and (b) functionally differentiated modern societies

Source: author's illustration

far. Even today, evidently, the structural coupling of politics and law 'is the exception by which the few centres of world society differ from the predominant peripheries' (Brodcz 2003: 88). In the latter, we can observe 'the permanent and generalised impediment to the reproduction of the legal system created by a broad variety of social factors such as money, power and relationships' (Neves 2001: 242). In autocratic modern societies, one of these factors—power—is predominant; in other words, the legal system is hierarchically subordinated to the political system. Therefore, the political system is either characteristically not or only marginally bound to adhere to legal rules. Moreover, the legal system can fulfil its function of establishing and stabilising normative expectations only to a limited extent in such societies. This is because the legal system's lack of autonomy always allows the political system to decide matters of legality and illegality whenever it wants to. Thus, in autocratic societies there is no rule of law but rule by law (see Figure 1). In some cases, there are even constitutions which, to a large extent, formally respect the principles of democracy and the rule of law. In practice, however, 'there is a lack of constitutional normativity consistent with the constitutional text' (Neves 2001: 260).

Accordingly, transition societies are faced with the following task: if they introduce democracy and the rule of law, they discontinue the law's subordination to politics. However, a newly formed or reformed constitution alone will not be able to achieve the differentiation and operational closure of the political and legal systems. In addition, many other social structures, for instance the political and legal cultures, will need to change. The constitution can only facilitate the conjunction of both systems with respect to their structural coupling (Luhmann 2000: 382). In brief, constitutions are not only a product of the functional differentiation of politics and law but also the supporters and perpetrators of this differentiation; however, they cannot produce it (Luhmann 1990: 213). Naturally, this differentiation process cannot be completed overnight with the formal enactment of a new constitution. Instead, the democratic transition that follows the liberalisation or breakdown of autocracy can be distinguished into two ideal-typical phases (see O'Donnell & Schmitter 1986):

(1) The first *democratisation* phase is characterised by either the formation and implementation of a new constitution or step-by-step modifications of an existing basic law. New institutions are successively established in this perennial phase, and they start functioning according to the logic of the simultaneously closing functional systems. At this most important stage of transition, the law not only has to fulfil the function of establishing and stabilising normative expectations but also has to advance the transition process itself (cf. Teitel 2005).

(2) In the subsequent *consolidation* phase, the functional systems have successfully finalised their operational closure. Ideally, the new constitution will now provide 'a form that can be read doubly, that both sides [i.e. the political and legal systems] can handle differently, without continuously provoking unsolvable conflicts' (Luhmann 2000: 392).

It is in this phase, however, that instead of a smooth consolidation, we often observe constitutional conflicts like the ones mentioned at the outset of this article. In a general systems-theoretical sense, conflicts are an 'operative autonomization of a contradiction'. They occur 'when expectations are communicated and the nonacceptance of the communication is communicated in return' (Luhmann 1995: 388). With reference to the general definition given at the beginning of this article, *constitutional conflicts between politics and law* can now be more specifically understood as *quarrels in which contradicting expectations of the political and the legal systems referring to the constitution collide with each other*. These conflicts, then, often become long-standing when they replace the original system reference (i.e. politics or law) with the new one of 'friend vs. foe'. This is especially problematic because the legal system normally offers independent conflict resolution and termination to other spheres of society. However, in these conflicts, the legal system is itself involved as an opposing party. As a consequence, conflict resolution becomes a difficult undertaking, if not impossible.

However, a collision between politics and law will occur only if the constitutional structures are inappropriate and do not sufficiently account for the autonomy of both systems. This is especially true if politics and law are structurally coupled, but the differing logic of the two systems is not sufficiently reflected in the actual way the constitution interrelates politics and law. Above all, this argument focuses on the configuration of certain state organs and their mutual relationships. These organisations do not appertain to just one of the functional systems, that is, either politics or law. In fact, the different forms of modern social systems (functional systems, organisations, interactions and so on) are not congruent with each other: public administration organs buy computers, parliaments edit newspapers, business companies lobby and churches issue political statements; in other words, different organs act across several functional systems. To ensure the functionality of a constitution and the differentiation of politics and law it is necessary, however, that the different state organs fulfil their constitutionally affiliated tasks. For organs which should, by definition, *primarily* communicate in the legal system, the decisive question is whether they predominantly administer justice and prosecute criminal offenses or pursue politics. This particularly holds true for ordinary courts, the procuracy and the organs entrusted with the administration of the judiciary, that is, the ministry of justice or special self-administration councils. For 'political' organs, the converse question holds true: whether they concentrate on political decision-making or decide judicial questions. This especially pertains to parliaments, governments and heads of state.

Based on these considerations, we can now formulate two general hypotheses (G) in order to explain the occurrence of constitutional conflicts between politics and law in transition societies:

Hypothesis G1: Constitutional conflicts between politics and law will occur if a constitutional order allows for the decision of legal questions based on political criteria or political questions based on legal criteria.

Hypothesis G2: Constitutional conflicts between politics and law will occur if a constitutional order provides the judiciary or the constitutional court the opportunity to decide political questions based on political criteria.

The conflict-provoking capacity of the cases covered by hypothesis G1 is directly caused by the intermixture of the differing functional logic of politics and law. In the cases described by hypothesis G2, conflicts are provoked by the absence of the political (i.e. democratic) legitimacy of political decisions taken by legal institutions.



## Two case studies: Constitutional conflicts in Bulgaria and Romania since 1991

In order to generate more concrete hypotheses on the question of when, in constitutional orders, and under what circumstances constitutional conflicts are to be expected, this article presents two exploratory case studies. Although these studies focus on post-socialist transitions in Central and Eastern Europe, the hypotheses obtained may be valid for post-autocratic transitions, in general. The two case studies contain the analyses of all the significant constitutional conflicts between politics and law that have occurred in Bulgaria and Romania since 1991. These two countries have been selected because they were among the first post-socialist countries to introduce entirely new constitutions after 1989 and afterwards, to a certain extent, successfully implement democracy and the rule of law. The result of these case studies is twofold: First, the abovementioned hypotheses are able to explain all conflicts analysed in the two countries, because one of the two hypothetical requirements was present in every conflict. In this sense, the systems-theoretical approach has already proved useful. Second, the analysis of the manifest constitutional conflicts allowed the two general hypotheses to be expanded into eight detailed hypotheses on the occurrence of constitutional conflicts. Naturally, the case studies can only be discussed in general terms; therefore, this article will mainly focus on highlighting the kinds of conflict which occurred in these two countries (for more details, see Hein 2011).

In *Bulgaria*, constitutional conflicts had already commenced in 1991:<sup>5</sup>

- In 1991/1992, 1994 and 1998/1999, there were three virulent constitutional conflicts pertaining to the composition of the Supreme Judicial Council—the judiciary’s self-administration organ. In all three cases, a new government attempted to conduct the council members’ re-election prior to the regular end of its five-year term. In 1994, the government also tried, albeit without success, to remove the prosecutor general and the president of the Supreme Court from office. In 1999, the government actively supported the election of its favourite candidate as prosecutor general. The common goal in all three conflicts was to establish political control over the judicial system’s personnel policy. While one of these efforts failed, two were successful.
- In 1995, Bulgaria experienced a turbulent conflict pertaining to the independence of the judiciary and the constitutional court. In this case, the newly elected socialist government tried to weaken the judiciary by presenting a budget law without a separate section for the Supreme Judicial Council, as is stipulated by the constitution. Subsequently, the government attempted to evict the constitutional court judges from office by citing some practical reasons as a paltry justification of its act. However, both these decisions were successfully annulled by the constitutional court.
- In 1996, there was an intense conflict associated with the establishment of two new highest-authority courts, the Supreme Court of Cassation and the Supreme Administrative Court. In order to exert political influence on the new courts, the socialist government attempted—without success—to postpone the appointments of the courts’ presidents until new regular elections to the Supreme Judicial Council could be held.
- The years 2003/2004 saw another hostile conflict over the election of the president of the Supreme Administrative Court. In this instance, the liberal government successfully obviated the appointment of a candidate associated with the parliamentary opposition (cf. Hein 2006: 177-180).
- Finally, from 2002 to 2009, Bulgaria underwent a long-lasting constitutional conflict concerning the prospects of judicial reform and related constitutional amendments. In the course of this conflict, the judiciary and the constitutional court systematically expanded their powers, not only reducing the political scope of the parliament and the government but also raising the hurdles for constitutional amendments (cf. Hein 2006, 2007).

<sup>5</sup> For a general overview of the political and legal developments in Bulgaria since 1989 see Ganev (2007), Bell (1998) and Giatzidis (2002).

Similar to Bulgaria, *Romania* experienced its first constitutional conflicts between politics and law only after the first democratic change of government following the creation of its constitution. Unlike Bulgaria, however, in Romania, the socialist successor party to the former communists won both the founding elections in 1990 and the first elections under the new constitutional order in 1992. It took until the end of 1996 for a non-socialist coalition to win the parliamentary and presidential elections, and the year 1997 saw the first constitutional conflicts between politics and law:<sup>6</sup>

- The first conflict in 1997 revolved around the new government's attempts at judicial reform. During this conflict, the government successfully changed the leadership of the highly politicised procuracy.
- From 2001 to 2003, the newly elected socialist government tried to (re-)politicise the judiciary, with tremendous success. This included many attempts to control the ordinary courts' adjudication and a very controversial election of members to the Superior Council of Magistracy.
- In 2005, Romania experienced a conflict regarding the enactment of the new parliamentary majority's package of judicial reform laws. These laws were partly abrogated by a controversial constitutional court decision. The conflict triggered a grave crisis of the government which entailed the non-implementation of several central parts of the reform package.
- Since 2006, the president, government, parliament, judiciary and the constitutional court have struggled to file criminal cases, particularly corruption cases, against current or former members of government. Until now, not a single former or current (prime) minister has been convicted or sentenced for any crime, including corruption (cf. Hein 2009).

As expected, the integration of Bulgaria and Romania into the European Union (EU) (cf. Grabbe 2006) significantly influenced the course of these abovementioned conflicts. Above all, it largely (re-)directed the reform policies of both countries with respect to the judiciary and the fight against corruption. This influence, however, did not invariably have a positive impact (see Smilov 2006). In some cases, the EU acted on the basis of inadequate problem perceptions and enforced reform packages that intensified the existing conflicts or provoked new ones instead of promoting helpful solutions. This was especially true during some phases of the conflict pertaining to judicial reform and related constitutional amendments that occurred in Bulgaria between 2002 and 2009 (Hein 2007, cf. Olteanu & Autengruber 2007). In any case, integration into the EU did not, in general, influence the occurrence or intensity of these conflicts. In fact, these countries saw a number of conflicts before the commencement of the integration process in addition to some conflicts that were independent from the concrete integration policies. Apart from EU integration, all the conflicts were caused or at least facilitated by certain constitutional rules.

## Constitutional conflicts between politics and law—where and why?

As this brief overview of the two case studies has illustrated, the large majority of situations that lead to constitutional conflicts are not only accidentally associated with the configuration of the judiciary and the constitutional court. In fact, it is here that the tension between the functional checks and balances between the different state organs, on the one hand, and the dysfunctional political influences on the legal sphere—or vice versa—on the other hand are much stronger than at any other point in constitutional orders. In contrast, it is difficult to implement workable arrangements that target the differentiation of politics and law. Therefore, only one of the following eight hypotheses is related to the executive and legislative branches. Altogether, the situations which can trigger constitutional conflicts can be subdivided into three groups:

---

<sup>6</sup> For a general overview of the political and legal developments in Romania since 1989, see Gallagher (2008), Carey (2004) and Mungiu-Pippidi (1999).

**Table 1.** Dimensions of the independence of justice

	Party detachment	Political insularity
<b>Formal level</b>	constitution (e.g. right to recuse appointment of judges) laws and other legal norms (e.g. sufficient salaries in order to prevent corruption)	constitution (e.g. ban on transfer, promotion or removal from office without consent) laws and other legal norms (e.g. sufficient financial resources for the courts)
<b>Informal level</b>	political and legal culture absence of clientelism absence of judges' interference on the basis of their political orientation absence of judges' interference on the basis of private relations absence of judges' interference with the public legitimacy of the court	political and legal culture absence of clientelism absence of judges' interference on the basis of their political orientation no refusal by other state organs to implement court decisions

Source: author's compilation, based on Fiss 1993: 58–60

- The first group comprises *judicial institutions*, where certain circumstances allow legal questions to be decided on the basis of political criteria. In concrete terms, two hypotheses deal with the ordinary courts while another two are concerned with the procuracy.
- The next 'group' is associated with only one hypothesis which describes a constellation wherein *political institutions* get the opportunity to decide legal questions based on political criteria. This hypothesis focuses on certain unlegislated areas of personal immunity in the executive and legislative branches.
- The final group comprises decisions taken at the *interface between politics and law*, that is, the constitutional court. This organisation systematically allows for the decision of legal questions based on political criteria and vice versa (three hypotheses).

The following sections will systematically elaborate on these eight hypotheses in order to substantiate this article's central argument.

### Politicised decisions in judicial institutions (I): The ordinary courts

For the administration of the judiciary, it is essential to pay close attention to three areas: the organisation of the judicial branch, its financial management and the personnel policy—including, above all, the appointment of judges and prosecutors. For courts and judges, that is, for proper adjudication, the problem would be as follows: on the one hand, the courts have to be protected from direct political influences in order to ensure the autonomy of the legal system. On the other hand, the organisational isolation of the courts presents the risk of producing a unified and separate judicial class. Such a class would not only go beyond the scope of democratic policy-making but also be susceptible to politicisation efforts at the informal level. Hence, we can empirically often find connections between all three areas of the judiciary's administration and the legislative as well as executive branches.

Constitutional conflicts can be ignited by ordinary courts due to the problematic nature of the *independence of justice* principle. This does not simply mean freedom for judges, since that would include a right to submit to any interest they deem suitable. On the contrary, 'judicial independence is not an intrinsic (ultimate) value, but merely an instrumental one. What is to be achieved is safeguarding of another value, namely the impartiality of the judge' (Bobek 2008: 101). Therefore, independent

judges are bound to the law in order to ensure the autonomy of the legal system. For this reason, it is necessary to distinguish between two aspects of judicial independence (see Fiss 1993: 58-60). First, there is the independence from all interests present in a trial or *party detachment*. Second, there is the independence from political instructions regarding the current activity or *political insularity*. These aspects have to be observed both at the *formal* and *informal* level. Thus, there are four dimensions of judicial independence which provide for the identification of several factors that institutionalise this independence (see Table 1). This leads to the following conclusion: if the independence of justice is limited to the formal level, the courts might be informally politicised by the government and other political actors, most notably the opposition. If, in contrast, protection only exists with regard to political insularity, the judges might also be susceptible to political interests present in a trial. Therefore, the politicisation of the judiciary can be obviated only if all four dimensions of judicial independence are effectively protected.

The real difficulty lies in finding a way to organise the judiciary democratically, which *not only* ensures judicial independence *but also* leaves the judiciary adequately equipped to deal with the tasks at hand. Empirically, we can observe a number of distinct models of judiciary administration. Concerning transition societies in Central and Eastern Europe, Sergio Bartole (1998) has identified four models with an increasing amount of political influence on the judiciary.

(1) The *judicial self-management model* is notably patterned after the experiences of Italy and France and can, for example, be found in Bulgaria, Romania and Croatia. Here, the judiciary largely organises itself autonomously by means of a special judicial council. The government, therefore, has very limited influence on judicial power. The legislature participates only in the election of council members, if at all. In contrast to the Italian and French archetypes, the Southeast European councils not only deal with the judiciary's personnel policy but also have substantial competences in the budgeting and organisation of the judicial branch. Even projects of law concerning the judiciary have to be reviewed by these councils before their enactment. The decisive advantage of this model is that the judiciary is protected from direct political influences. Potential problems could arise from two sources: from the indirect politicisation of council members, since they are elected by the parliament, and from the possibility of the emergence of a unified and separate judicial class.

(2) The *mixed model*, present in Lithuania, Macedonia and Slovenia, combines elements of judicial self-organisation with management by the executive and/or legislative branches. The judicial councils mainly perform consultant, recommendatory or approving functions. Nevertheless, the executive and/or legislative branches have to cooperate with them.

(3) The *management by the executive model* is notably based on the German experience and, for instance, has been established in the Czech Republic. There, the government (i.e. the ministry of justice) almost entirely commands the administration of the judiciary. The most crucial advantage for transition societies is that these 'procedures and solutions certainly do not favour a tendency of magistrates to form a unified separate corps' (Bartole 1998: 67).<sup>7</sup> Even though this model has some advantages with regard to judicial reform and financial management, it can, nevertheless, generate significant impairments to judicial independence. Therefore, this independence is secured by means of extensive individual rights for judges, for instance, through a ban on the transfer, promotion or removal of a judge without the consent of the person concerned. The success of this construction depends firstly on a working parliamentary control of the executive. This is particularly precarious in parliamentary democracies with an overlap between the government and the parliamentary majority. Secondly, it is necessary to ensure the legal protection of judges' rights, which is even more precarious when the judiciary is administrated by the executive branch.

<sup>7</sup> For details on the resistance against judicial reform attempts which nevertheless appeared within the Czech magistracy and the constitutional conflicts provoked by means of constitutional court decisions, see Bobek (2008).

(4) Finally, the *management by the legislative and executive model* simply does not show any differentiation between politics and law. In this model, all important decisions in the fields of organisation, financial administration and personnel policy are taken by the head of state, the government or the parliament using some kind of cooperation mechanism. Therefore, this model is characterised by the domination of politics over law. This model, for example, can be found in the Russian Federation, the Ukraine and Belarus, where it 'resembles the archetype of Soviet constitutions' (Bartole 1998: 68). These post-socialist countries, incidentally, appear to have developed into deficient democracies if not (semi-) autocracies, given their modest implementation of democratisation and rule of law.

Apart from the problem of adequate equipment, the two dimensions of political insularity are particularly crucial with regard to judicial independence. If court organisation is patterned after the *management by the executive model*, the courts do, in fact, become part of the executive branch, and decisions pertaining to the appointment of judges can be taken by politicians. However, political insularity and thereby the differentiation between politics and law can be ensured, as mentioned above, by providing extensive individual rights for judges. In any case, this construction is precarious because, apart from the general parliamentary control over the government, this model contains no institutional checks and balances for stabilising the judiciary. The *judicial self-management model*, in contrast, provides a much greater level of security for judicial independence but simultaneously presents the risk of the emergence of a unified and separate judicial class, which can potentially exceed the scope of democratic policy-making and be susceptible to politicisation efforts at the informal level. In both the ideal-typical cases, there are high chances of constitutional conflicts between politics and law because these cases allow for the decision of legal questions on the basis of political criteria. In short, the conflict probability looks like an inverted Gaussian bell curve. The first detailed hypotheses (D), therefore, are as follows:

Hypothesis D1: Constitutional conflicts between politics and law will occur if the executive and legislative branches do not or only marginally participate in the judiciary's administration.

Hypothesis D2: Constitutional conflicts between politics and law will occur if the executive and legislative influences on the judicial branch exceed a certain level of functional checks and balances.

## Politicised decisions in judicial institutions (II): The procuracy

The procuracy is an integral part of the legal system. Its main task is the prosecution of criminal behaviour, that is, the preparation for adjudication. From the organisational point of view, we find an assignment to both the executive branch (based on the 'Prussian model') and the judiciary (based on the 'Italian model').<sup>8</sup> Although the arguments concerning the procuracy are largely congruent with those related to the courts, the results of the case studies on Bulgaria and Romania clearly suggest a model for the organisation of the procuracy that will maintain a low probability of constitutional conflict. This model is the Italian one.

To begin with, the Prussian model has two favourable aspects: First, this model defines the prosecution of offenses as not being a part of the core of jurisdiction. In consequence, it can be organised as a checks-and-balances mechanism between the government and the courts. Second, the police authorities doubtlessly belong to the executive branch, and without them, it is simply impossible to bring about a successful prosecution of criminal cases. Therefore, it would be reasonable to combine the procuracy and the police in the executive branch. However, this entails the peril of political infringements on the prosecutors' work, which in turn endangers the independence

<sup>8</sup> For more information on both models, see Roxin (1997: 110–113), György (1996: 20–21) and Di Federico (1998: 375–378).

of justice. This particularly holds true if the leading prosecutors maintain the status of ‘political executives’ (*politische Beamte*), who are subordinated to the supervision of the ministry of justice and can be retired at any time without justification. This has been the case in Germany for a long time and this setup continues to be practiced there at the federal level and in several federal states (see Rautenberg 2003: 170–174). This particularly jeopardises the prosecution of criminal offenses committed by members of government, most notably if the prosecutors ‘act as gatekeepers to the judiciary’ (Aaken *et al.* 2004: 262)—that is, if they enjoy the monopoly to indict offenders for their crimes. At first glance, this problem is apparently resolvable by a formal separation of the procuracy *within* the executive branch from the current government’s political goals. This can be done by means of a number of formal rules (cf. Aaken *et al.* 2004: 266–273):

- Personal independence for the prosecutors through extensive individual rights, notably including a ban on the transfer, promotion or removal of a prosecutor from office without the consent of the person concerned
- A prohibition on the minister of justice to give direct orders to the procuracy in concrete cases as well as in questions of general interest
- A term duration for the head of the procuracy that is longer than, or at least not congruent with, the executive’s regular term, combined with a ban on reappointment
- A complementary distribution of the right to indict to other state organs (for instance the police, as in Norway), to non-governmental organisations (as in Germany in the field of environmental law), to the victim of a crime and so on
- The principle of mandatory prosecution of major crimes, which does not leave the decision of whether or not to bring a case to court to the discretion of the prosecutors. This principle can be combined with a judicial review of the procuracy’s decision to start or refuse the prosecution of minor crimes
- A working parliamentary control of the government

However, an organisational structure patterned along these recommendations would be a paradox: it would inevitably produce a serious problem of governability, due to the presence of a self-contained room of governance within the executive branch, which would be inaccessible to the government while at the same time being part of its political accountability. In addition, the procuracy would still be susceptible to politicisation efforts at the informal level.

It would be more reasonable to have an organisational assignment of the procuracy to the judicial branch patterned after the Italian model. In this case, other state organs such as the head of state, government, parliament or the courts have to exercise control over the procuracy’s functioning. This can be achieved through the possibility of conducting effective impeachment proceedings against the head of the procuracy through a combination of a parliamentary initiative with a binding court decision. Furthermore, the head of the procuracy can be appointed by the parliament based on a qualified majority vote, in combination with a ban on reappointment and a term duration which outlasts the regular legislative period. In addition, this structure can incorporate some of the abovementioned rules such as the principle of mandatory prosecution, judicial review of the procuracy’s decision to start or refuse a prosecution and a wider distribution of the right to indict. Moreover, the prevalent practice of assigning decisional authority to the head of the procuracy, in particular, needs to be brought under legal supervision. The addition of these organisational elements should sufficiently prevent politicisation at the informal level. In contrast, we can identify two constellations which provide for the decision of legal questions based on political criteria and, therefore, account for a high probability of constitutional conflicts between politics and law. The resultant third and fourth detailed hypotheses are as follows:

Hypothesis D3: Constitutional conflicts between politics and law will occur if the procuracy is organisationally assigned to the executive branch.

Hypothesis D4: Constitutional conflicts between politics and law will occur if the procuracy is organised as part of the judiciary in a way that it cannot be controlled by the executive and legislative branches through working checks and balances.

The few empirical research results in this field already support these hypotheses. Cross-national analyses have already revealed that the independence of prosecution agencies from the executive branch reduces government corruption to a large extent (Aaken *et al.* 2010).

### Judicial decisions in political institutions: Unlegislated areas of personal immunity in the executive and legislative branches

In the course of the two exploratory case studies, it was possible to determine only one but, nevertheless, very crucial point in the constitutional orders, where political institutions were enabled to decide legal questions based on political criteria. Some constitutions, by providing for personal immunity rights, establish spheres of social action that are hardly accessible or even inaccessible to the legal system and, therefore, constitute sources for constitutional conflicts. Such rights are typically assigned to members of parliament, members of government, prosecutors and (constitutional) judges. There is a classic justification for the immunity of the first group in the sense of safeguarding the legislature against infringements by the executive branch (see Hulst 2000: 78-80). Moreover, parliamentary immunity is an important instrument to ensure the legislature's independent emergence from the government in the first phase of democratic transition. The same argument applies to prosecutors, constitutional judges and ordinary court judges. An analogous justification, however, does not exist for the members of government: against whom do they want to be protected? Paradoxically, constitutional orders that immunise members of government against criminal prosecution (as found in France, Romania, Lithuania and Greece) design this protection to be even more comprehensive than that for their deputies. The latter are safeguarded only against imprisonment and conviction for the duration of their mandate, while the former cannot even be brought under investigation without the consent of either the parliament, the head of state or a specialised committee. In addition, immunity often applies to former members of government as well.

From the systems-theoretical point of view, the protection of judges and prosecutors is functional as far as it *safeguards* central institutions of the legal system and the structural coupling of politics and law against destructive political influences. In contrast, the immunity of members of government and members of parliament is dysfunctional because it *allows* political dominance over certain legal questions. Thereby, politicians can effectively protect themselves from being prosecuted for criminal offenses. This is especially, though not solely, relevant in many transition societies. Due to the local, often problematic political culture of the political elite, we cannot expect politicians to pass requests from the procuracy to allow criminal prosecution against 'their own kind'.<sup>9</sup> In today's consolidated democracies, parliamentary immunity incidentally does not have a more or less symbolic character. This is because deputies no longer need to be protected against illegal executive attacks aimed at producing or obviating certain voting results in the legislature. Hence, the fifth detailed hypothesis is as follows:

Hypothesis D5: Constitutional conflicts between politics and law will occur if a constitution provides personal immunity rights for members of parliament or members of government.

### Decisions at the interface between politics and law: The constitutional court

The last three hypotheses concern the central institution at the interface between politics and law: the constitutional court. Owing to the fact that virtually all transition societies which introduced constitutional review have opted for either a separate constitutional court or a specialised section in the

<sup>9</sup> This is, for instance, the case in Romania (see Hall 2004: 215, Hein 2009).

highest court (cf. Ginsburg 2003, González Marcos 2003, Schwartz 1993), the following considerations primarily refer to specialised courts. Regardless of the fact that the arguments regarding the independence of justice concern both ordinary and constitutional courts, these institutions have to be discussed separately in the systems-theoretical perspective, because constitutional courts cannot be characterised as communicating primarily in *either* the legal *or* the political system. Although a constitutional review is subject to ‘the requirements and conditions of a court of law’, it is certainly not ‘detached from the gravitation field of contention for gaining, exercising and preserving political power’ (Böckenförde 1999: 10–11, cf. Grimm 2000: 115). Moreover, the constitutional court is the organisation that stabilises the constitution as a structural coupling between politics and law (see Bornemann 2007: 83–84). Hence, *constitutional courts act systematically both in the legal and the political systems*. Almost every judgment has some consequences on the legal system (e.g. the abrogation of an unconstitutional law) and the political system (e.g. the retroactive defeat of the parliamentary majority that enacted this law).

The political and legal consequences of constitutional court communications ‘are completely different because they occur in different systems and in different recursive networks under different criteria and concrete conditions’ (Luhmann 1991: 1435). Consequently, the *function* of a constitutional review clearly surpasses that of the judiciary because the interpretation of the often vague and amenable constitutional law not only allows for constitutional *adjudication* but also de facto for *constitution-making*. The court does not merely fill the legal ‘gaps’ left open by the legislature; by means of its interpretations, it transforms or even reinvents constitutional norms, for example, in the light of changing societal circumstances. Therefore, constitutional courts are systematically required to make political decisions regardless of whether or not the current legal doctrines concede this (see Kelsen 1929). In this manner, constitutional courts possess a unique interpretive power. This is the real problem associated with organising a constitutional court. Although communicating both in the legal and the political systems, it has to be an independent court in order to prevent the political interests of the legislative or executive branches from being directly transferred to the court, which would endanger the court’s adjudication *as* adjudication. The absence of such independence would jeopardise the differentiation of politics from law and could potentially culminate in the dominance of politics over law. Constitutional courts, per se, have some leeway for making decisions based on political criteria. However, if this margin is too wide, and if the court is dependent on the political interests of other state powers, constitutional conflicts will be provoked.

‘Without a constitutional court’, however, ‘a constitution is tongueless in conflict situations’ (Vorländer 2006: 12). If successful, a constitutional review may strengthen the constitution’s function as a structural coupling of politics and law. In order to attain this objective, constitutional courts are sometimes organisationally assigned to the judicial branch, notably in older constitutional texts (e.g. in the German *Grundgesetz* of 1949). The majority of the subsequently established constitutions of transition societies reflect the specificity of the constitutional review and provide a separate chapter for the constitutional court. Regardless of these organisational opportunities, the dual status of the relationship between politics and law often facilitates the central role played by constitutional courts in constitutional conflicts. Since these courts regularly take important political decisions, they are of outstanding interest to political actors. Therefore, the decisive factors that explain the occurrence of constitutional conflicts which involve these courts are (1) the independence of the judges, (2) their appointment rules and (3) the existence of legislative control mechanisms.

(1) Constitutional orders can only ensure the independence of constitutional judges at the formal level (see Table 1). This can be done by means of sufficient financial and organisational resources, a long-lasting but non-renewable mandate, the absence of external impeachment proceedings, the



requirement of a long-term professional experience or a minimum age for the appointment of judges and the total absence of any opportunity for the legislature to overrule constitutional court decisions through a simple vote. Naturally, even the combination of all these elements cannot entirely obviate 'a self-politicisation of constitutional courts whose members voluntarily toe political party lines' (Grimm 2001: 188). However, without adequate protection of the judges' independence at the formal level, constitutional conflicts are much more likely. On this basis, the sixth detailed hypothesis is as follows:

Hypothesis D6: Constitutional conflicts between politics and law will occur if the independence of the constitutional judges is not empirically ensured in all its four dimensions of formal and informal party detachment and political insularity.

If judicial independence is limited to the formal level only, the courts might be informally politicised both by the government and by any other political actor (most notably, the opposition). Paradoxically, an exceptionally high degree of formal independence could even encourage a certain degree of politicisation at the informal level.

(2) The independence of constitutional judges is especially imperilled if the 'political' institutions themselves elect their own controllers. Unfortunately, the most obvious solution to this problem—to choose constitutional judges by lot from a previously defined group of qualified jurists—has only been implemented in Greece so far.<sup>10</sup> The majority of states have instead opted for election modes which generally incorporate several state organs in proportional or sequential procedures<sup>11</sup> and often stipulate the requirement of qualified majorities in the case of parliamentary elections. However, the empirical effects of all these modes largely depend on informal influences, for example, the fragmentation of the party system. The development of the consolidated democracies in Western and Southern Europe has shown that 'a combination of formal and informal rules and practices exclude strong party activists from the list of potential nominees. This refers to persons who have openly demonstrated and widely publicised their ideological views on controversial political issues. As a consequence, moderates are favoured over fanatics' (Alivizatos 1995: 577).

By reversing the abovementioned requirements for the appointment of nonpartisan constitutional judges, we can arrive at the seventh detailed hypothesis:

Hypothesis D7: Constitutional conflicts between politics and law will occur if the appointment rules for constitutional judges do not provide for the appointment of nonpartisan judges.

(3) The question of legislative control mechanisms vis-à-vis the constitutional court is related to the contingency problem of judicial interpretation. Owing to the previously stated fact that constitutional law is often vague and of fundamental character, the courts have ample scope to interpret it and are relatively unpredetermined in their concretion of the constitutional norms. Even if the constitutional text itself contains instructions on how to observe and describe its norms, this does not lead to a general limitation of interpretation (Grimm 2000: 113). The problem, therefore, is how 'to draw the line between interpretations that can be legitimised within a democratic rule of law and interpretations not attributable to the constitutional and legal texts in accordance with the rule of law principle' (Neves 2000: 157). However, there is no easy solution to this problem. Neither can a plausible answer be found by means of scientific methods nor is there an airtight model of court organisation. It would also be problematic to dispense with the indisputable advantages of a constitutional review for the stability and effectiveness of a constitutional order.

The solution can only be found beyond the field of interpretation. In principle, the constituent power—that is, the parliament and potentially the constituency—should be empowered to reverse all the decisions of the constitutional court by means of regular constitutional amendments. 'The legitimacy of independent constitutional review paradoxically lies in its institutional vulnerability. Its

<sup>10</sup> For the history of the lot as a political decision and allocation procedure and the arguments that speak in favour of lotteries, see Buchstein (2010).

<sup>11</sup> Even co-optative elements are applied (e.g. in Portugal).

authority is regarded as accepted exactly because in a serious conflict situation there is no need for democratic politics to accept its decisions' (Scharpf 2005: 723).<sup>12</sup> In fact, we seldom observe the use of this legislative control mechanism. However, it is also true that serious conflicts can be provoked due to the absence of a viable opportunity to amend the constitution. This can take the form of eternity clauses (e.g. in Germany) or be manifest in constitutional court decisions that narrow the opportunities for constitutional amendments (e.g. in Bulgaria). In addition, barring clauses that ban new judgments on issues that have already been decided can potentially intensify conflict situations. These elements establish legal spheres that are beyond the political system's scope of democratic legislation and which therefore endanger the structural coupling of politics and law. Thus, the final detailed hypothesis is given as follows:

Hypothesis D8: Constitutional conflicts between politics and law will occur if the constituent power has no viable opportunity to amend the constitution in order to reverse constitutional court decisions.

## Conclusion: Constitutional conflicts as 'engines of consolidation'

This paper has presented a general explanation of the occurrence of constitutional conflicts between politics and law in transition societies. On the basis of a systems-theoretical understanding of politics and law, it was possible to deduce two general hypotheses claiming that constitutional conflicts will occur under two circumstances: first, if a constitutional order allows for the decision of legal questions based on political criteria or vice versa, and second, if a constitutional order provides the judiciary or the constitutional court the opportunity to decide political questions based on political criteria. Within the narrow bounds of two exploratory case studies on the constitutional conflicts that have occurred in Bulgaria and Romania since 1991, these general hypotheses were confirmed. Therefore, these hypotheses can be regarded as valid at least for the post-socialist transitional context of Central and Eastern Europe. Following the case studies, these assumptions were further expanded into eight detailed hypotheses on the question of when, in constitutional orders, and under what circumstances constitutional conflicts can be expected. Future cross-national and cross-regional analyses can be conducted to test the validity of these detailed hypotheses.

It should be noted that these eight hypotheses cannot be considered independent from one another. On the basis of these hypotheses, one can expect a substantial amount of reciprocal effects which are either conflict-provoking or, paradoxically as it may seem, conflict-avoiding. The probability of constitutional conflicts involving the constitutional court will indeed be higher if neither the independence of the constitutional judges is ensured in all four dimensions (D6) nor their appointment rules provide for the appointment of nonpartisan judges (D7). In contrast, however, the existence of personal immunity rights for members of parliament or members of government (D5) will not provoke constitutional conflicts if the procuracy is controlled by the current political majority (D3). Correspondingly, the fact that the parliament has no viable opportunity to amend the constitution in order to reverse constitutional court decisions (D8) is not likely to cause constitutional conflicts if the constitutional judges are dependent on the current parliamentary majority due to the presence of appointment rules which do not provide for the appointment of nonpartisan judges (D7). Nevertheless, with respect to the question of the consolidation of democracy and the rule of law, such conflict-avoiding constellations can certainly not be considered unproblematic. The abovementioned constellations feature the sectoral superordination of politics over law and, therefore, establish enclaves characterised by the absence of both democracy and the rule of law. Hence, the presence of such constellations might be an attempt to explain failing transitions. In general, further research on constitutional conflicts might lead to more

<sup>12</sup> This argument dates back to Alexis de Tocqueville's (1835: 100–101) comparison of the amendable US constitution and the unamendable French basic law.

in-depth insights into the scope of newly established institutions, because these conflicts point to weak implementation of democratic decisions. If, for instance, ordinary courts are controlled by judges who were politically appointed by a former government (D1), these courts can obstruct the decisions of new parliamentary majorities by intentionally misinterpreting or simply ignoring new laws.

In the end, this article concludes that constitutional conflicts in transition societies do not inevitably impede but may instead advance the consolidation of democracy and the rule of law. Hence, such conflicts can be regarded as 'engines of consolidation'. In fact, it is improbable, if not impossible, for post-autocratic constitution- and institution-making to immediately produce 'perfect' constitutional orders. On the contrary, new constitutional orders are more likely to comprise some problematic elements which will eventually provoke conflicts. Furthermore, it is apparently possible for even long-lived democracies to possess or even introduce problematic constitutional rules that will provoke manifest conflicts in a longer course of time. Due to this possibility, the hypotheses developed here might be applicable not only to transition societies but also to consolidated democracies. With respect to the consolidation of newly established democracies, the decisive question is whether their constitutional orders allow them and the respective political actors are able and willing to settle problematic constitutional provisions by means of constitutional reforms. Concerning the relationship of politics and law, this is the key to the successful consolidation of democracy and the rule of law.

## References

- Aaken, A. v., Feld, L. P. & Voigt, S. (2010). Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across 78 Countries, *American Law and Economics Review* 12(1): 204-244.
- Aaken, A. v., Salzberger, E. & Voigt, S. (2004). The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch—A Conceptual Framework, *Constitutional Political Economy* 15: 261-280.
- Alivizatos, N. C. (1995). Judges as Veto Players, in H. Döring (ed.), *Parliaments and Majority Rule in Western Europe* (566-589). Frankfurt/Main, New York: Campus.
- Bartole, S. (1998). Alternative Models of Judicial Independence. Organizing the Judiciary in Central and Eastern Europe, *East European Constitutional Review* 7(1): 62-69.
- Bell, J. D. (ed.) (1998). *Bulgaria in Transition. Politics, Economics, Society and Culture after Communism*. Boulder: Westview.
- Bobek, M. (2008). The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries, *European Public Law* 14(1): 99-123.
- Böckenförde, E.-W. (1999). Verfassungsgerichtsbarkeit. Strukturfragen, Organisation, Legitimation [Constitutional Review. Structural Issues, Organization, Legitimacy], *Neue Juristische Wochenschrift* 44(1): 9-17.
- Bornemann, B. (2007). Politisierung des Rechts und Verrechtlichung der Politik durch das Bundesverfassungsgericht? Systemtheoretische Betrachtungen zum Wandel des Verhältnisses von Recht und Politik und zur Rolle der Verfassungsgerichtsbarkeit [Politicisation of Law and Judicialisation of Politics by the Federal Constitutional Court? Systems-Theoretical Considerations on the Changes of the Relationship between Law and Politics and the Role of Constitutional Review], *Zeitschrift für Rechtssoziologie* 28(1): 75-95.
- Brodocz, A. (2003). Das politische System und seine strukturellen Kopplungen [The Political System and Its Structural Couplings], in K.-U. Hellmann, K. Fischer & H. Bluhm (eds), *Das System der Politik. Niklas Luhmanns politische Theorie [The Political System. Niklas Luhmann's Political Theory]* (80-94). Wiesbaden: Westdeutscher Verlag.

- Buchstein, H. (2010). Reviving Randomness for Political Rationality: Elements of a Theory of Aleatory Democracy, *Constellations* 17(3): 435-454.
- Calleros, J. C. (2009). *The Unfinished Transition to Democracy in Latin America*. New York: Routledge.
- Carey, H. F. (ed.) (2004). *Romania since 1989. Politics, Economics, and Society*. Lanham: Lexington Books.
- Di Federico, G. (1998). Prosecutorial Independence and the Democratic Requirement of Accountability in Italy. Analysis of a Deviant Case in a Comparative Perspective, *British Journal of Criminology* 38(3): 371-387.
- Esser, H. (2007). Soll das denn alles (gewesen) sein? Anmerkungen zur Umsetzung der soziologischen Systemtheorie in empirische Forschung [Is This Supposed to Be Everything? Notes on the Implementation of the Sociological Systems Theory in Empirical Research], *Soziale Welt* 58(3): 351-358.
- Fiss, O. M. (1993). The Limits of Judicial Independence, *The University of Miami Inter-American Law Review* 25: 57-76.
- Gallagher, T. (2008). *Modern Romania. The End of Communism, the Failure of Democratic Reform, and the Theft of a Nation*. New York: New York University Press.
- Ganev, V. I. (2007). *Preying on the State. The Transformation of Bulgaria after 1989*. Ithaca: Cornell University Press.
- Gerring, J. (2004). What Is a Case Study and What Is It Good for? *American Political Science Review* 98: 341-354.
- Giatzidis, E. (2002). *An Introduction to Post-communist Bulgaria. Political, Economic and Social Transformations*. Manchester, New York: Manchester University Press.
- Ginsburg, T. & Moustafa, T. (eds) (2008). *Rule by Law. The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press.
- Ginsburg, T. (2003). *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.
- Gönenç, L. (2002). *Prospects for Constitutionalism in Post-communist Countries*. The Hague: Nijhoff.
- González Marcos, M. (2003). Specialized Constitutional Review in Latin America. Choosing Between a Constitutional Chamber and a Constitutional Court, *Verfassung und Recht in Übersee* 36(2): 164-205.
- Grabbe, H. (2006). *The EU's Transformative Power. Europeanization through Conditionality in Central and Eastern Europe*. Basingstoke: Palgrave Macmillan.
- Grey, R. D. (ed.) (1997). *Democratic Theory and Post-communist Change*. Upper Saddle River: Prentice Hall.
- Grimm, D. (2000). Constitutional Adjudication and Democracy, in M. Adenas (ed.), *Judicial Review in International Perspective* (103-20). Den Haag: Kluwer Law International.
- Grimm, D. (2001). *Die Verfassung und die Politik. Einsprüche in Störfällen [The Constitution and Politics. Objections in Cases of Malfunctions]*. München: Beck.
- György, K. (1996). Introductory Lecture: The public prosecutor's Office in the Transitional Period, in Council of Europe (ed.), *The Transformation of the Prokuratura into a Body Compatible with the Democratic Principles of Law* (13-23). Strasbourg: Council of Europe Publishing.
- Habermas, J. (1990). *The Philosophical Discourse of Modernity. Twelve Lectures*. Cambridge, Mass: MIT Press.
- Hall, R. A. (2004). Political Culture in Post-Ceaușescu Romania, in H. F. Carey (ed.), *Romania since 1989. Politics, Economics, and Society* (215-225). Lanham: Lexington Books.
- Hansen, C. (2008). 'Guerra de Cortes'—Der Konflikt zwischen dem Spanischen Verfassungsgericht und dem Spanischen Obersten Gericht [*'Guerra de Cortes'—The Conflict Between the Spanish Constitutional Court and the Spanish Supreme Court*]. Hamburg: Dr. Kovač.
- Hein, M. (2006). Prekäre Stabilität. Verfassungskonflikt und Verfassungspolitik in Bulgarien seit 2002 [Precarious Stability. Constitutional Conflict and Constitutional Politics in Bulgaria since 2002], *Südosteuropa* 54(2): 164-196.
- Hein, M. (2007). Verfassungspolitisches perpetuum mobile in Bulgarien [Bulgarian Constitutional Politics: A Perpetual Motion Machine], *Südosteuropa Mitteilungen* 47(3): 62-78.
- Hein, M. (2009). Von toten Tanten und getauschten Grundstücken. Zur Bekämpfung der Regierungskorruption in Rumänien und der Rolle des Parlaments [Dead Aunts, Exchanged Estates. The Fight against Government Corruption in Romania and the Role of the Parliament], *Zeitschrift für Parlamentsfragen* 40(4): 824-840.

- Hein, M. (2011). *Verfassungskonflikte zwischen Politik und Recht in Südosteuropa. Bulgarien und Rumänien nach 1989 im Vergleich [Constitutional Conflicts between Politics and Law in Southeast Europe. A comparative study of Bulgaria and Romania after 1989]*. PhD Dissertation, University of Greifswald (forthcoming).
- Hulst, M. v. d. (2000). *The Parliamentary Mandate. A Global Comparative Study*. Geneva: Inter-Parliamentary Union.
- John, R., Henkel, A. & Rückert-John, J. (2010). Methodologie und Systemtheorie—ein Problemaufriss [Methodology and Systems Theory—An Outline of the Problem], in: R. John, A. Henkel & J. Rückert-John (eds), *Die Methodologien des Systems [The Methodologies of the System]* (7-12). Wiesbaden: VS Verlag für Sozialwissenschaften.
- Kelsen, H. (1929). Wesen und Entwicklung der Staatsgerichtsbarkeit [The Legal Guarantee of the Constitution], *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 5: 30-88.
- King, M. (2006). What's the Use of Luhmann's Theory? In: M. King & C. Thornhill (eds), *Luhmann on Law and Politics. Critical Appraisals and Applications* (37-52). Oxford: Hart.
- Lauth, H.-J. & Sehring, J. (2009). Putting Deficient Rechtsstaat on the Research Agenda: Reflections on Diminished Subtypes, *Comparative Sociology* 8(2): 165-201.
- Luhmann, N. (1973). Politische Verfassungen im Kontext des Gesellschaftssystems [Political Constitutions in the Context of the Societal System], *Der Staat* 12: 1-22 & 165-182.
- Luhmann, N. (1990). Verfassung als evolutionäre Errungenschaft [Constitution as an Evolutionary Achievement], *Rechtshistorisches Journal* 9: 176-220.
- Luhmann, N. (1991). Operational Closure and Structural Coupling: The Differentiation of the Legal System, *Cardozo Law Review* 13: 1419-1441.
- Luhmann, N. (1995). *Social Systems*. Stanford: Stanford University Press.
- Luhmann, N. (2000). *Die Politik der Gesellschaft [Politics as a Social System]*. Frankfurt/Main: Suhrkamp.
- Luhmann, N. (2004). *Law as a Social System*. Oxford: Oxford University Press.
- Melone, A. P. (1996). The Struggle for Judicial Independence and the Transition Toward Democracy in Bulgaria, *Communist and Post-Communist Studies* 29(2): 231-243.
- Mungiu-Pippidi, A. (1999). Romania: From Procedural Democracy to European Integration, in M. Kaldor & I. Vejvoda (eds), *Democratization in Central and Eastern Europe* (135-149). London, New York: Pinter.
- Neves, M. (2000). *Zwischen Themis und Leviathan: Eine schwierige Beziehung. Eine Rekonstruktion des demokratischen Rechtsstaates in Auseinandersetzung mit Luhmann und Habermas [Between Themis and Leviathan: A Difficult Relationship. A Reconstruction of the Democratic Rule of Law Discussing Luhmann and Habermas]*. Baden-Baden: Nomos.
- Neves, M. (2001). From the Autopoiesis to the Allopoiesis of Law, *Journal of Law and Society* 28(2): 242-264.
- O'Donnell, G. A. & Schmitter, P. C. (1986). *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies*. Baltimore: Johns Hopkins University Press.
- Olteanu, T. & Autengruber, C. (2007): Wie ernst meint es die EU mit der Demokratie? Standardsetzung am Beispiel der EU-Beitrittsvorbereitungen mit Bulgarien und Rumänien [How Serious is the EU about Democracy? Standard-setting in the Preparation for the EU-Accession of Bulgaria and Romania], *Österreichische Zeitschrift für Politikwissenschaft* 36(1): 81-94.
- Pollack, D. (1990). Das Ende einer Organisationsgesellschaft. Systemtheoretische Überlegungen zum gesellschaftlichen Umbruch in der DDR [The End of an Organizational Society. Systems-theoretical Reflections on the Transition in the GDR], *Zeitschrift für Soziologie* 19(4): 292-307.
- Raadt, J. d. (2009a). Contestable Constitutions: Ambiguity, Conflict, and Change in East Central European Dual Executive Systems, *Communist and Post-Communist Studies* 42: 83-101.
- Raadt, J. d. (2009b). Contested Constitutions. Legitimacy of Constitution-making and Constitutional Conflict in Central Europe, *East European Politics and Societies* 23(3): 315-338.
- Rautenberg, E. C. (2003). Staatsanwaltschaft und Gewaltenteilung. Ein Plädoyer für die Zuordnung der Staatsanwaltschaft zur Judikative [Procuracy and Separation of Powers. A Plea for the Assignment of the Procuracy to the Judiciary], *Neue Justiz* 57: 169-175.

- Roxin, C. (1997). Zur Rechtsstellung der Staatsanwaltschaft damals und heute [On the Legal Status of the Procuracy in the Past and Today], *Deutsche Richterzeitung* 75: 109-121.
- Scharpf, F. W. (2005). Legitimationskonzepte jenseits des Nationalstaats [Concepts of Legitimacy Beyond the Nation State], in G. F. Schuppert, I. Pernice & U. Haltern (eds), *Europawissenschaft [European Science]* (705-741). Baden-Baden: Nomos.
- Schönfelder, B. (2005). Judicial Independence in Bulgaria: A Tale of Splendour and Misery, *Europe-Asia Studies* 57(1): 61-92.
- Schwartz, H. (1993). The New East European Constitutional Courts, in A. E. D. Howard (ed.), *Constitution Making in Eastern Europe* (163-207). Washington, D.C.: Woodrow Wilson Center Press.
- Sedelius, T. (2008). *The Tug-of-War between Presidents and Prime Ministers. Semi-Presidentialism in Central and Eastern Europe*. Saarbrücken: VDM.
- Smilov, D. (2006). EU Enlargement and the Constitutional Principle of Judicial Independence, in W. Sadurski, A. Czarnota & M. Krygier (eds), *Spreading Democracy and the Rule of Law? Implications of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (313-334). Dordrecht: Springer.
- Teitel, R. (2005). Transitional Rule of Law, in A. W. Czarnota, M. Krygier & W. Sadurski (eds), *Rethinking the Rule of Law after Communism* (279-294). Budapest, New York: Central European University Press.
- Tocqueville, A. d. (1990 [1835]). *Democracy in America Volume 1*. New York: Vintage Books.
- Troxel, T. A. (2003). *Parliamentary Power in Russia, 1994-2001. President vs. Parliament*. Basingstoke: Palgrave Macmillan.
- Uzelac, A. (2002). Ist eine Justizreform in Transitionsländern möglich? Das Beispiel Kroatien [Is Judicial Reform Possible in Transition Countries? The Example of Croatia], *Jahrbuch für Ostrecht* 43: 175-206.
- Vaughan, D. (1992). Theory Elaboration: The Heuristics of Case Analysis, in C. C. Ragin & H. S. Becker (eds), *What Is a Case? Exploring the Foundations of Social Inquiry* (173-202). Cambridge: Cambridge University Press.
- Verba, S. (1967). Some Dilemmas in Comparative Research, *World Politics* 20: 111-127.
- Vorländer, H. (2006). Deutungsmacht—Die Macht der Verfassungsgerichtsbarkeit [Interpretive Power—The Power of Constitutional Review], in H. Vorländer (ed.), *Die Deutungsmacht der Verfassungsgerichtsbarkeit [The Interpretive Power of Constitutional Review]* (9-33). Wiesbaden: VS Verlag für Sozialwissenschaften.

**Michael Hein** is a research assistant and a doctoral student at the University of Greifswald (Germany), Department of Political and Communication Sciences. His main research interests are: political systems in South Eastern Europe, constitutional politics, constitutional courts, and systems theory. Recent publications include: Systemtheorie und Politik(wissenschaft) – Missverständnis oder produktive Herausforderung? [Systems Theory and Politics/Political Science—Misunderstanding or Productive Challenge?] in C. Gansel (ed.): *Systemtheorie in den Fachwissenschaften. Zugänge, Methoden, Probleme [Systems Theory in the Scientific Disciplines. Approaches, Methods, Problems]* (53-77). Göttingen: V&R unipress 2011; in 2009 together with Hubertus Buchstein: Randomizing Europe. The Lottery as a Decision-Making Procedure for Policy Creation in the EU. *Critical Policy Studies* 3(1): 29-57.

#### Acknowledgements:

I would like to thank Hubertus Buchstein, Judith Engelke, Karsten Fischer, Anna Fruhstorfer, Philipp Harfst, Silvia von Steinsdorff, Petra Stykow and the two anonymous reviewers for their helpful comments.